

## APPENDIX A

MAI-CR2d 15.44, and the Notes on Use accompanying that instruction form, provide as follows:

### **15.44 Guilty of Capital Murder: Submission of Mitigating Circumstances -**

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. \_\_\_\_\_, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of [name of victim].

(You may also consider [here insert and, if more than one, list and number in separate paragraphs any one or more of the following "statutory mitigating circumstances" which are supported by evidence. Omit this entire paragraph if there are no such circumstances to submit.]

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the murder of [name of victim] was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. Whether [name of victim] was a participant in the defendant's conduct or consented to the act.

4. Whether the defendant was an accomplice in the murder of [name of victim] and whether his participation was relatively minor.

5. Whether the defendant acted under extreme duress or substantial domination of another person.

6. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

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7. The age of the defendant at the time of the offense.)

(You may also consider [See Note 4])

(You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment. [See Note 5])

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

#### Notes on Use

1. This instruction will be read to the Jury immediately after MAI-CR 15.42.

2. The blank in the first paragraph will be filled in with the number given MAI-CR 15.42.

3. The second paragraph must be given, whether requested or not, if there is evidence supporting any "statutory" mitigating circumstance. See Sections 565.012.1 (2) and 565.012.3.

4. The third paragraph must be given, whether requested or not, if there is evidence supporting a mitigating circumstance or circumstances "authorized by law". See Section 565.012.1 (3). If more than one such circumstance is submitted, each one should be numbered, begin with the word "That", and set off in a separate paragraph not connected with an "and" or an "or".

Omit all of the third paragraph if there are no such circumstances to submit.

The phrase "authorized by law" does not limit extenuating or mitigating circumstances to those specifically directed to death penalty issues. Section 556.006.2 provides, in part, that "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of punishment, including the record of any prior

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criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas".

Note also that RSMo 1969, Section 552.030.3(2) provides that "evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible . . . for the purpose of determining whether or not the defendant, if found guilty of a capital offense, shall be sentenced to death or life imprisonment." Therefore, in directing the jury to consider extenuating or mitigating circumstances "otherwise authorized by law", the court should permit the jury to consider any evidence that the defendant suffered from a "mental disease or defect" as that phrase is defined in Section 552.010, RSMo 1969, and in MAI-CR 2.32. In such case one of the mitigating circumstances might be: "That the defendant had a mental disease or defect at the time of the murder of [name of victim]". The court must then follow that with the MAI-CR 2.32 definition of "mental disease or defect" even if that definition was also given at the first stage of the trial.

5. The jury may consider extenuating or mitigating circumstances even though not set out as "statutory" mitigating circumstances in Section 565.012.3 and even though not "authorized by law" within the meaning of that phrase discussed in 4 above. However, no instruction should be given calling the jury's attention to any particular circumstance referred to in general in this paragraph.